79-1586

Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1979

No. 79-.....

UNITED STATES OF AMERICA,
Respondent,

vs.

JAMES WILLIS ROBERTS,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES OF AMERICA,
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JAMES WILLIS ROBERTS,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, James Willis Roberts, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This case was initially submitted to the United States Court of Appeals, Eighth Circuit, on September 14, 1979. The opinion of the Court of Appeals reversing the District Court's order suppressing use of evidence was entered on November 13, 1979 (Appendix A). Thereafter a rehearing en banc was granted and the case was once again submitted on January 16, 1980. The opinion of the Court of Appeals reversing the District Court's suppression of the use of evidence was filed on March 12, 1980 (Appendix B).

JURISDICTION

The judgment of the Court of Appeals upon which this Writ of Certiorari is sought was entered on March 12, 1980, after a rehearing en banc.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the District Court properly determined that the warrantless seizure of goods from a leased storage unit was unreasonable under the Fourth Amendment to the Constitution and should be suppressed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner James Willis Roberts was indicted in the Western District of Missouri under 21 U.S.C., Section 841 (a) (1), on two counts of Possession of Marijuana with Intent to Distribute. Petitioner's motion to suppress the marijuana was sustained by the District Court, since the

suppression of the physical evidence would have been effectively dispositive of the case, the government appealed to the Eighth Circuit Court of Appeals.

In November of 1978, Petitioner was the lessee of two storage units at Stor-All of Independence and Stor-All of Gladstone. The storage units at those locations were generally kept locked by the lessees, with the lessee's own padlocks and each storage unit was a completely separate unit with no windows and a solid door.

The evening of November 29, 1978, the general manager of the Stor-All business in the Kansas City area, Mr. Tom Pepper, was notified that several unlocked storage units had been discovered in Independence and Gladstone. Mr. Pepper responded to the Gladstone location with a private investigator in the employ of Stor-All, where they discovered broken padlocks near several unlocked units. Both Pepper and the private investigator entered an unlocked unit and found what appeared to be a large bag of marijuana. Pepper closed the door to that storage unit and along with the private investigator, went to the Independence location.

At the Independence location Pepper again discovered broken padlocks near several unlocked storage units. He and the private investigator looked into these units and discovered in one of them several boxes which upon inspection proved to contain marijuana. Pepper called the Kansas City, Missouri Police Department and told them of what he had discovered, and at approximately 9:00 p.m. on November 29, 1978, several law enforcement officers, including DEA Task Force Officer Jack Albrecht, arrived at the Independence location. Pepper took the officers to the location of the storage unit and told them what he had seen. The officers then entered the storage

unit and seized what was later identified to be approximately 900 pounds of marijuana.

The following morning some of the same officers met Mr. Pepper at the Gladstone location where he took them to the unit where he had previously observed a large bag. The officers entered the storage unit and seized the bag which was later found to contain approximately 56 pounds of marijuana.

Officers seizing the marijuana did not, on either occasion, have warrants for the search of the storage bins or the seizure of the marijuana.

On appeal, a panel of the Court of Appeals reversed the order suppressing the evidence seized. On rehearing, a majority of the Court reversed the order insofar as it applied to the seizure at Independence, but affirmed the order insofar as it applied to the seizure in Gladstone. It is from the reversal of the suppression order having to do with the seizure in Independence that the Petitioner seeks review.

REASONS FOR GRANTING THE WRIT

The issue presented for review is whether the seizure of the marijuana located in a rented storage facility is reasonable under the Fourth Amendment.

The Stor-All Storage facility is similar to a number of storage units which have sprung up across the United States. On a large, fenced lot a series of cement block buildings contain a number of smaller units, each with exterior access. Each unit consists of a room of solid cement block walls and a windowless door. The lessee may place his own lock on that door and leases the unit by the month. (Presumably a lessee could leave his unit unlocked if he so chose.)

Clearly, the manager of such a storage complex does not have the authority to authorize a search of any individual leased unit, or the seizure of the contents of any such leased unit. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Stoner v. California,* 376 U.S. 483 (1964); *Chapman v. United States,* 365 U.S. 610 (1961); *United States v. Jeffers,* 342 U.S. 48 (1951); *Lustig v. United States,* 338 U.S. 74 (1949). For that reason the question becomes whether the actions of the manager could somehow be interpreted to constitute a private (albeit unlawful) seizure of the contraband. Such a "private" seizure would thus act to insulate the law enforcement authorities from the requirements of the Fourth Amendment.

The manager left the apparent contraband in the storage unit with the door closed. He secured the outside, gate and when the police arrived, he admitted them. Thereafter the police seized the apparent contraband and removed it from the locker. No lock was ever placed on the locker compartment itself.

To characterize the action of the manager in this case as a "private seizure" would be the equivalent to allowing a hotel manager to lock the main doors to a hotel and thereby effect a "private seizure" of the contents of each room to allow the police to search and seize the contents thereof without warrant. That result is clearly unreasonable because the expectation of privacy which underlines a citizen's right to be free of unreasonable government seizure of his possessions is not determined by a citizen's immediate ability to retrieve his property. *Stoner v. California,* supra; *United States v. Chadwick,* 433 U.S. 1 (1977); *Arkansas v. Sanders,* ..... U.S. ....., 99 S.Ct. 2586 (1979).

Storage units of the type involved in this matter are rapidly spreading throughout the United States. This is as far as Petitioner can determine, a case of first impres-

sion. It is unlikely to be the last such case, and the law in this area should not be decided by a closely divided Eighth Circuit Court of Appeals.

There is a burgeoning force of private security employees throughout the United States. If the criteria established by the Eighth Circuit is allowed to stand as precedent, then there is likely to be a flood of "private seizures" that will inundate the Fourth Amendment warrant requirement. That is not a matter which should be decided by a sharply divided Court of Appeals.

CONCLUSION

For the reasons above stated, Petitioner respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1396

United States of America,
Appellant,

v.

James Willis Roberts,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 14, 1979
Filed: November 13, 1979

Before BRIGHT and HENLEY, Circuit Judges, and REGAN, Senior District Judge.*

HENLEY, Circuit Judge.

This is an appeal by the government from an order of the United States District Court for the Western District of Missouri, suppressing as evidence large quantities of marijuana which had come into the hands of the government and which it intended to use as evidence at the trial of the defendant, James Willis Roberts, who had been in-

*The Honorable John K. Regan, United States Senior District Judge for the Eastern District of Missouri, sitting by designation.

dicted in early 1979 on two charges of possession of marijuana with intent to distribute it in violation of 21 U.S.C. § 841(a)(1). We have jurisdiction of the appeal under the provisions of 18 U.S.C. § 3731.

After having been indicted, the defendant moved to suppress the evidence contending that the seizure of the material by law enforcement officers without a warrant was unreasonable and violated his rights under the fourth amendment to the Constitution of the United States.

In resisting the motion the government took the position that the initial search of certain private storage facilities where the contraband had been concealed and the initial "seizure" of the material were purely private, and that the fourth amendment was inapplicable.

The district judge rejected that contention, and in so doing he relied heavily on the opinion of this court in *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976). In coming to his conclusion that the fourth amendment required suppression of the evidence, the district judge found that the search and seizure with which he was concerned did not fall within any of the recognized exceptions to the warrant requirement of the amendment, including the exception based on the familiar "plain view" doctrine that has been considered frequently by this court.

For reversal, the government argues that *Kelly, supra,* was not decided correctly and that, in any event, that case is not applicable to the facts of this case. And the government also contends that the ultimate seizure of the material was justified by reference to the plain view doctrine.

The district court held an evidentiary hearing on the defendant's motion and on May 9, 1979 it filed an unpublished memorandum opinion dealing with the motion. The controlling facts relative to the discovery and seizure of

the contraband are not in dispute, and we can do no better than copy the succinct statement of those facts that appears in the opinion of the district court.

> The following facts were developed during an evidentiary hearing that was held by this Court on April 17, 1979. In November, 1978, defendant was the lessee of certain storage units at Stor-All of Independence and at Stor-All of Gladstone. The storage units at these locations were generally kept locked by the lessees with the lessees' own padlocks. On the evening of November 29, 1978, employees at the Stor-All of Independence and at the Stor-All of Gladstone notified Tom Pepper, who is the general manager of all of the Stor-All businesses in the Kansas City area, that they had discovered several unlocked storage units at these two locations. After hearing of the unlocked units, Mr. Pepper and a private investigator who worked for Mr. Pepper went to the Gladstone Stor-All to investigate the unlocked units. In the course of their investigation, they discovered broken padlocks near several of the unlocked units. Mr. Pepper and the private investigator entered the unlocked units and found, in one of them, what appeared to be a large bag of marihuana. Mr. Pepper closed the door to that storage unit and, along with the private investigator, went to the Independence Stor-All.
>
> At the Independence Stor-All, Mr. Pepper again discovered broken padlocks near several unlocked storage units. Mr. Pepper looked into these unlocked units and discovered, in one of them, several boxes of what appeared to be marihuana. Mr. Pepper called the Kansas City police department and told them what he had discovered. At approximately 9:00 p.m.

on November 29, 1978, several law enforcement officers, including D.E.A. Task Force Officer Jack Albrecht, arrived at the Independence Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the boxes and he explained to the officers what he had seen. The officers then entered the storage unit and seized what was later identified to be approximately 900 pounds of marihuana.

The following morning, the officers met Mr. Pepper at the Gladstone Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the large bag on the prior evening. The officers entered the storage unit and seized the bag, which was later found to contain approximately 56 pounds of marihuana.

The officers who seized the marihuana did not, on either the evening of November 29, 1978 or the morning of November 30, 1978, have warrants for the search of the storage bins or for the seizure of the marihuana.

After investigation, the officers identified defendant Roberts as the lessee of the storage bins in which the marihuana was found. Defendant Roberts was subsequently indicted for two counts of possession with intent to distribute marihuana, in violation of 21 U.S.C. § 841(a)(1) (1976).

The trial court also found that the search and seizure were not incident to a lawful arrest, and that no exigent circumstances existed that would have justified warrantless proceedings by law enforcement officers. The government does not quarrel with those findings.

In considering whether the search and seizure could be justified under the plain view exception to the amend-

ment's warrant requirement, the trial court referred to *Chapman v. United States*, 365 U.S. 610 (1961). Referring to *Chapman* the district court said:

> . . . In *Chapman v. United States*, 365 U.S. 610 (1961), the Court rejected the argument that law enforcement officers may gain entry to a building at a landlord's invitation and then seize anything within plain view. The Court held, 'to uphold such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]."' *Chapman v. United States, supra* at 616-17.

In refusing to apply the plain view doctrine to this case the district court was clearly correct. In order for that doctrine to be applicable three conditions must be met: (1) the officer who observes the material must be where he has a legal right to be; (2) the discovery must be inadvertent; and (3) the contraband or otherwise incriminatory nature of the material must be apparent immediately. *United States v. Pugh*, 566 F.2d 626, 627 (8th Cir. 1977) *cert. denied*, 435 U.S. 1010 (1978); *United States v. Wilson*, 524 F.2d 598, 598 (8th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976). *See also* the discussion of the doctrine that appears in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1973), wherein the Court emphasized the importance in plain view context of the "inadvertency" requirement.

In this case there is no question that when the officers observed the marijuana, they were where they had a legal right to be, and we will assume that the contraband nature of the material was immediately apparent to experienced officers if not to laymen. It cannot be contended, however, that the officers observed this marijuana inadvertently; they had been called to the scene

to look at it, and when they came on the Stor-All premises at Independence and at Gladstone, they knew exactly what they were looking for and what they might reasonably expect to find.

Turning now to the question of whether the warrantless actions of the officers in this case were reasonable apart from any of the exceptions to the general requirement of a warrant, which exceptions have been mentioned, both sides recognize that where a search and seizure are conducted by private parties without government participation, the fourth amendment is not applicable even though the seized material is later turned over to the officers and used as evidence in a criminal prosecution. *United States v. Kelly, supra,* 529 F.2d at 1371 and cases cited.

Where a search and an ultimate seizure are initiated and largely carried out by private persons, but where law enforcement officers get involved in the overall process and ultimately take over the material seized, this court has held that a court in determining whether there has been a violation of the fourth amendment must consider: (1) official involvement in the initial search, and (2) official involvement in the effective seizure of the item or items in question. *United States v. Haes,* 551 F.2d 767, 770 (8th Cir. 1977); *cf. United States v. Entringer,* 532 F.2d 634 (8th Cir.), *cert. denied,* 429 U.S. 820 (1976).

In this case it is clear that the marijuana in question was initially discovered and made secure by the Stor-All people; there was no official involvement in those actions by either state or federal officers. Our inquiry, then, is whether there was such an official involvement in the ultimate seizure as to bring the fourth amendment into play.

As we have observed, the trial judge in answering that question in the affirmative relied heavily on *United States v. Kelly, supra,* which involved allegedly obscene publications that had been transported in interstate commerce and received by the defendant in alleged violation of 18 U.S.C. § 1462. Those publications were at least arguably protected by the first as well as by the fourth amendment. Without going into detail with respect to the facts of *Kelly,* it may be said that on seven or eight separate occasions cartons of publications moving by common carrier from Cleveland, Ohio to St. Louis, Missouri, where defendant's adult bookstore was located, were discovered to have been broken in transit. In line with the policy of the carrier, one of its employees examined the contents of the broken parcels and came to the conclusion that they were obscene. On each occasion the employee notified a particular agent of the Federal Bureau of Investigation. On the first and on several subsequent occasions, the agent took samples of the publications from the parcels which were then resealed and delivered to the book store. On the final occasion the agent took no samples but he did mark the publications for identification and later purchased one of them. Neither the shipper nor the consignee was aware of the ongoing investigation, and indeed with respect to the parcels from which the agent took samples, the defendant obtained credit from the shipper for the publications that he did not receive.

Citing Roaden v. Kentucky, 413 U.S. 496, 501-06, this court held that where first amendment materials are involved, there must be a closer adherence to the fourth amendment than in cases involving such things as contraband or weapons. *United States v. Kelly, supra,* 529 F.2d at 1373. And the court concluded that on the record

before it, there was enough government involvement to entitle the defendant to the protection of the amendment.[1]

In search and seizure context where searches and seizures of obscene material were initiated and largely effected by private parties, and where the defendant in a criminal prosecution instituted later has moved to suppress the seized material as evidence, two circuits have declined to follow *Kelly's* holding that first amendment materials are entitled to more fourth amendment protection than items not protected by the former amendment. *United States v. Sanders,* 592 F.2d 788 (5th Cir. 1979); *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976), *cert. denied,* 437 U.S. 909 (1978).

We think that the district court's reliance on *Kelly* was misplaced. Assuming, at least arguendo, the validity of the distinction drawn in *Kelly* between a case involving the first amendment and a case not involving that amendment, we think that *Kelly* is plainly distinguishable from this case on two grounds. First, the marijuana involved in this case can hardly be said to have been protected by the first amendment. Second, the police involvement in this case was not comparable in either quality or persistence to the official involvement present in the *Kelly* case.

In our view the searches and seizures involved in this case were private and were essentially completed when the officers arrived on the Stor-All premises. We see nothing unreasonable or unconstitutional in the actions

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1. It should be noted perhaps that *Roaden v. Kentucky,* 413 U.S. 496 (1973), did not involve any private action. There an allegedly obscene picture film was seized without a warrant by the local sheriff who was in the company of the local prosecuting attorney.

of the officers in taking over from private persons the contraband that had been effectively seized already.[2]

Accordingly, the order of the district court suppressing evidence is vacated, and the cause is remanded to that court for further appropriate proceedings consistent with this opinion.

BRIGHT, Circuit Judge, dissenting.

The majority has determined that the plain view exception to the warrant requirement will not justify the Government's seizure of the evidence in question. While agreeing with that determination, I do not agree that the evidence in question is nonetheless admissible as the product of a private rather than governmental seizure.[1]

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2. In this connection we note that the facilities at both Gladstone and Independence were surrounded by substantial fences. Before Mr. Pepper and the private investigator left the Gladstone facility for the Independence facility, the door to the unit in which the marijuana had been found at the Gladstone facility was closed and bolted, and the gate giving access to the overall facility was locked. Thus, the defendant could not have repossessed and carried away the 56 pounds of marijuana which he had left at Gladstone. As to the Independence premises, Pepper, the detective and other Stor-All personnel remained on the scene until the officers arrived. It is not to be supposed that if the defendant had appeared at Independence prior to the arrival of the officers and had demanded access to the unit leased by him, his demand would have been granted. It is hornbook law that a finding of possession of a thing may be predicated upon effective control as well as on actual, immediate physical possession. Whether the lessor's conduct amounted to trespass, conversion, or some other tort is immaterial. Once the lessor took possession, the lessor's act of turning the contraband over to the officers did not alter the fact that an effective seizure by the lessor had taken place prior to the appearance of the officers, and the ultimate seizure was not changed from a private to a public one simply because the lessor had not picked the marijuana up physically and removed it from the leased units to some other place or places.

1. Aside from plain view and private seizure, appellant puts forward no other exceptions to the warrant requirement that might apply here. In particular, exigent circumstances which

(Continued on following page)

In reversing the trial court, the majority determines that the lessor of the storage units, not the police, seized the marijuana. Yet the record establishes that

—the lessor left the apparent contraband in storage until the police arrived;

—the lessor closed the doors to the unlocked units and secured the outside gate;

—the police, not the lessor, actually removed the evidence.

Neither the majority nor the appellant has cited any case justifying the conclusion that, upon entry into privately leased premises with the consent of the landlord, the police may lawfully seize contraband without a warrant. Indeed, the case law supports a contrary conclusion. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Stoner v. California,* 376 U.S. 483 (1964); *Chapman v. United States,* 365 U.S. 610 (1961); *United States v. Jeffers,* 342 U.S. 48 (1951); *Lustig v. United States,* 338 U.S. 74 (1949). *See also Abel v. United States,* 362 U.S. 217 (1960).

Writing for this court before *Coolidge* was decided, Judge (now Justice) Blackmun, citing *Stoner, Chapman, Jeffers, Lustig, Abel,* and other cases, observed:

> It appears now to be well settled that, in the absence of abandonment, a landlord's or hotel's consent to search leased premises is not effective as against a tenant or guest. [*Drummond v. United States,* 350

Footnote continued—
might explain the failure to obtain a warrant are conspicuously absent. *Compare United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976) *with United States v. Entringer,* 532 F.2d 634 (8th Cir.), *cert. denied,* 429 U.S. 820 (1976). The district court order suppressing the evidence in this case is entirely consistent with the result in *Kelly.*

F.2d 983, 989 (8th Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966) (citations omitted).][2]

The Government has asserted no theory of abandonment and repossession and in fact no abandonment or repossession of the premises occurred in this case. *Cf. United States v. Wilson*, 472 F.2d 901 (9th Cir.), *cert. denied*, 414 U.S. 868 (1973) (tenant's absence, unpaid rent, and apartment door having been left ajar justified landlord's repossession); *Eisentrager v. Hocker*, 450 F.2d 490 (9th Cir. 1971) (tenant's absence and especially the presence of a hidden corpse provided adequate evidence of abandonment for repossession). By virtue of his lease agreements, appellee possessed important privacy interests in the two storage units. The lessor-owner did nothing to extinguish the leases or to dispossess the appellee of his property located in these storage units. Indeed, the evidence here discloses that the lessor left the appellee's property undisturbed and intact, except to invite a police viewing.

It may be that the police viewing in this case did not constitute a governmental search, because it occurred after a thorough private search. *See United States v. Bomengo*, 580 F.2d 173 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1022 (1979); *cf. United States v. Rodriguez*, 596 F.2d 169, 174 (6th Cir. 1979) (police activity exceeded the bounds of the prior private search). Whatever the nature of the search, it is clear that there was no private seizure. *See Burdeau v. McDowell*, 256 U.S. 465 (1920). The private conduct in this case served to insulate the police from the strictures of the fourth amendment only to the extent that they shared the lessor's viewing of the apparent

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2. *Accord, Corngold v. United States*, 367 F.2d 1, 7-8 (9th Cir. 1966) (although either consent or abandonment suffices to diminish one's expectations of privacy, neither was present).

contraband. The lessor took no steps to remove the appellee's property from his storage units. The police actually seized the contraband. Before making that seizure, the police should have obtained a warrant. *See United States v. Bomengo, supra.*

Accordingly, I would affirm the order of the district court suppressing the evidence.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1396

United States of America,
Appellant,

v.

James Willis Roberts,
Appellee.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: January 16, 1980
Filed: March 12, 1980

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY and McMILLIAN, Circuit Judges.

HENLEY, Circuit Judge.

This is an appeal by the government from an order of the United States District Court for the Western District of Missouri (District Judge William R. Collinson) suppressing as evidence two lots of marijuana which had come into the possession of the government and which it planned to use as evidence in the trial of the defendant, James Willis Roberts, who had been indicted on two counts of possession of the drug with intent to distribute it. The charges were brought under 21 U.S.C. § 841(a)(1). We have jurisdiction of the appeal by virtue of 18 U.S.C. § 3731.

The appeal was heard originally by a panel consisting of Circuit Judge Bright, the writer, and United States Senior District Judge John K. Regan of the Eastern District of Missouri sitting by designation. The majority of the panel voted to reverse the judgment of the district court on both counts of the indictment. Judge Bright dissented. Thereafter the defendant moved for rehearing and rehearing en banc. Rehearing en banc was granted. This is the opinion of the majority of the en banc court.

I.

After having been indicted, the defendant moved to suppress the evidence contending that the seizure of the material by law enforcement officers without a warrant was unreasonable and violated his rights under the fourth amendment to the Constitution of the United States.

In resisting the motion the government took the position that the initial search of certain private storage facilities where the contraband had been concealed and the initial "seizure" of the material were purely private, and that the fourth amendment was inapplicable.

The district judge rejected that contention, and in so doing he relied heavily on the opinion of this court in *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976). In coming to his conclusion that the fourth amendment required suppression of the evidence, the district judge found that the search and seizure with which he was concerned did not fall within any of the recognized exceptions to the warrant requirement of the amendment, including the exception based on the familiar "plain view" doctrine that has been considered frequently by this court.

For reversal, the government argues that *Kelly, supra,* was not decided correctly and that, in any event, that case is not applicable to the facts of this case. And the

government also contends that the ultimate seizure of the material was justified by reference to the plain view doctrine.

The district court held an evidentiary hearing on the defendant's motion and on May 9, 1979 it filed an unpublished memorandum opinion dealing with the motion. The controlling facts relative to the discovery and seizure of the contraband are not in dispute, and we can do no better than copy the succinct statement of those facts that appears in the opinion of the district court.

> The following facts were developed during an evidentiary hearing that was held by this Court on April 17, 1979. In November, 1978, defendant was the lessee of certain storage units at Stor-All of Independence and at Stor-All of Gladstone. The storage units at these locations were generally kept locked by the lessees with the lessees' own padlocks. On the evening of November 29, 1978, employees at the Stor-All of Independence and at the Stor-All of Gladstone notified Tom Pepper, who is the general manager of all of the Stor-All businesses in the Kansas City area, that they had discovered several unlocked storage units at these two locations. After hearing of the unlocked units, Mr. Pepper and a private investigator who worked for Mr. Pepper went to the Gladstone Stor-All to investigate the unlocked units. In the course of their investigation, they discovered broken padlocks near several of the unlocked units. Mr. Pepper and the private investigator entered the unlocked units and found, in one of them, what appeared to be a large bag of marihuana. Mr. Pepper closed the door to that storage unit and, along with the private investigator, went to the Independence Stor-All.

At the Independence Stor-All, Mr. Pepper again discovered broken padlocks near several unlocked storage units. Mr. Pepper looked into these unlocked units and discovered, in one of them, several boxes of what appeared to be marihuana. Mr. Pepper called the Kansas City police department and told them what he had discovered. At approximately 9:00 p.m. on November 29, 1978, several law enforcement officers, including D.E.A. Task Force Officer Jack Albrecht, arrived at the Independence Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the boxes and he explained to the officers what he had seen. The officers then entered the storage unit and seized what was later identified to be approximately 900 pounds of marihuana.

The following morning, the officers met Mr. Pepper at the Gladstone Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the large bag on the prior evening. The officers entered the storage unit and seized the bag, which was later found to contain approximately 56 pounds of marihuana.

The officers who seized the mariuhana did not, on either the evening of Noxember 29, 1978 or the morning of November 30, 1978, have warrants for the search of the storage bins or for the seizure of the marihuana.

After investigation, the officers identified defendant Roberts as the lessee of the storage bins in which the marihuana was found. Defendant Roberts was subsequently indicted for two counts of possesssion with intent to distribute marihuana, in violation of 21 U.S.C. § 841(a)(1) (1976).

The trial court also found that the search and seizure were not incident to a lawful arrest, and that no exigent circumstances existed that would have justified warrantless proceedings by law enforcement officers. The government does not quarrel with those findings.

In considering whether the search and seizure could be justified under the plain view exception to the amendment's warrant requirement, the trial court referred to *Chapman v. United States*, 365 U.S. 610 (1961). Referring to *Chapman* the district court said:

> . . . In *Chapman v. United States*, 365 U.S. 610 (1961), the Court rejected the argument that law enforcement officers may gain entry to a building at a landlord's invitation and then seize anything within plain view. The Court held, 'to uphold such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]."' *Chapman v. United States, supra* at 616-17.

In refusing to apply the plain view doctrine to this case the district court was clearly correct. In order for that doctrine to be applicable three conditions must be met: (1) the officer who observes the material must be where he has a legal right to be; (2) the discovery must be inadvertent; and (3) the contraband or otherwise incriminatory nature of the material must be apparent immediately. *United States v. Pugh*, 566 F.2d 626, 627 (8th Cir. 1977), *cert. denied*, 435 U.S. 1010 (1978); *United States v. Wilson*, 524 F.2d 598, 598 (8th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976). *See also* the discussion of the doctrine that appears in *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1973), wherein the Court emphasized the importance in plain view context of the "inadvertency" requirement.

In this case there is no question that when the officers observed the marijuana, they were where they had a legal right to be, and we will assume that the contraband nature of the material was immediately apparent to experienced officers if not to laymen. It cannot be contended, however, that the officers observed this marijuana inadvertently; they had been called to the scene to look at it, and when they came on the Stor-All premises at Independence and at Gladstone, they knew exactly what they were looking for and what they might reasonably expect to find.

II.

Turning now to the question of whether the warrantless actions of the officers in this case were reasonable apart from any of the exceptions to the general requirement of a warrant, which exceptions have been mentioned, both sides recognize that where a search and seizure are conducted by private parties without government participation, the fourth amendment is not applicable even though the seized material is later turned over to the officers and used as evidence in a criminal prosecution. *United States v. Kelly, supra,* 529 F.2d at 1371 and cases cited.

Where a search and an ultimate seizure are initiated and largely carried out by private persons, but where law enforcement officers get involved in the overall process and ultimately take over the material seized, this court has held that a court in determining whether there has been a violation of the fourth amendment must consider: (1) official involvement in the initial search, and (2) official involvement in the effective seizure of the item or items in question. *United States v. Haes,* 551 F.2d 767, 770 (8th Cir. 1977); *cf. United States v. Entringer,* 532 F.2d 634 (8th Cir.), *cert. denied,* 429 U.S. 820 (1976).

In this case it is clear that the marijuana in question was initially discovered by the Stor-All people; there was no official involvement in connection with the discovery by either state or federal officers. Our inquiry, then, is whether there was such an official involvement in the ultimate seizures of the drug as to bring the fourth amendment into play.

As we have observed, the trial judge in answering that question in the affirmative relied heavily on *United States v. Kelly, supra,* which involved allegedly obscene publications that had been transported in interstate commerce and received by the defendant in alleged violation of 18 U.S.C. § 1462. Those publications were at least arguably protected by the first as well as by the fourth amendment. Without going into detail with respect to the facts of *Kelly,* it may be said that on seven or eight separate occasions cartons of publications moving by common carrier from Cleveland, Ohio to St. Louis, Missouri, where defendant's adult bookstore was located, were discovered to have been broken in transit. In line with the policy of the carrier, one of its employees examined the contents of the broken parcels and came to the conclusion that they were obscene. On each occasion the employee notified a particular agent of the Federal Bureau of Investigation. On the first and on several subsequent occasions, the agent took samples of the publications from the parcels which were then resealed and delivered to the book store. On the final occasion the agent took no samples but he did mark the publications for identification and later purchased one of them. Neither the shipper nor the consignee was aware of the ongoing investigation, and indeed with respect to the parcels from which the agent took samples, the defendant obtained credit from the shipper for the publications that he did not receive.

Citing Roaden v. Kentucky, 413 U.S. 496, 501-06, this court held that where first amendment materials are involved, there must be a closer adherence to the fourth amendment than in cases involving such things as contraband or weapons. *United States v. Kelly, supra,* 529 F.2d at 1373. And the court concluded that on the record before it, there was enough government involvement to entitle the defendant to the protection of the amendment.[1]

In search and seizure context where searches and seizures of obscene material were initiated and largely effected by private parties, and where the defendant in a criminal prosecution instituted later has moved to suppress the seized material as evidence, two circuits have declined to follow *Kelly's* holding that first amendment materials are entitled to more fourth amendment protection than items not protected by the former amendment. *United States v. Sanders,* 592 F.2d 788 (5th Cir. 1979); *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976), *cert. denied,* 437 U.S. 909 (1978).

III.

As to the distinction drawn in *Kelly* between a case involving the first amendment and a case not involving that amendment, we think that it should be said, first, that the marijuana involved here can hardly be said to have been entitled to any first amendment protection.

Second, the police involvement in this case overall was not comparable in either quality or persistence to the official involvement present in the *Kelly* case.

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1. It should be noted perhaps that *Roaden v. Kentucky,* 413 U.S. 496 (1973), did not involve any private action. There an allegedly obscene picture film was seized without a warrant by the local sheriff who was in the company of the local prosecuting attorney.

IV.

As we have pointed out, two separate discoveries and seizures of drugs are involved in this case. The first count of the indictment relates to the unlawful possession of marijuana stored at the Independence facility; the second count relates to the unlawful possession of the substance stored at the Gladstone facility. However, and this is a somewhat confusing facet of the case, the Stor-All personnel discovered the contraband at Gladstone before they discovered the contraband at Independence.[2]

In neither instance are we concerned with the "discovery" of the drug. The discoveries were clearly private, and they were clearly proper. Our concern is with the constitutionality of the ultimate actions of the officers in taking physical possession of the respective quantities of contraband that have been described.

Since the marijuana was discovered at Gladstone before the discovery at Independence, we first consider the validity of the Gladstone seizure (Count II). The discovery at Gladstone was made in the comparatively early evening of November 29 and after it was made the Stor-All personnel proceeded to Independence. Before leaving the Gladstone facility the employees secured the premises by bolting an exterior door. However, counsel for the government conceded in effect at argument before the court en banc that this "securing" of the premises was simply routine and thus it was not designed particularly to prevent the lessee of the locker in which the marijuana was found from reacquiring possession of his stored property whatever it might have been.

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2. The quantity of the drug discovered at Independence was very much larger than the quantity discovered at Gladstone.

The Stor-All people met the police at Gladstone on the morning of November 30, at which time the officers entered the facility and observed and took possession of the marijuana.

From our consideration we are satisfied that the seizure at Gladstone was an unjustified warrantless seizure of the drug by law enforcement officers, and that the evidence based on that seizure was properly suppressed. We, therefore, affirm the district court with respect to Count II.

A different situation is presented as to Count I. When Stor-All agents found some 900 pounds of a substance that appeared to be marijuana stored in the Independence facility, they immediately mounted guard over the premises and notified the police. Officers appeared on the scene promptly and took possession of the material in question which turned out to be marijuana. The work of the officers with respect to the seizure at Independence was not completed until the small hours of November 30, 1978 which may tend to explain why the Gladstone facility was not immediately visited by the officers.

Had a claimant of the material stored at Independence undertaken to take possession of the material between the time it was discovered by private persons and the time of the arrival of the officers, it is unreasonable to think that he would have been allowed to pick up, destroy, or take away the contraband.

We conclude, therefore, that the drug stored at Independence had been seized privately before the arrival of the officers, and that the district court erred in suppressing evidence based on that seizure.

Accordingly, we reverse the district court as to Count I while affirming as to Count II. The case is remanded for further appropriate proceedings.

BRIGHT, Circuit Judge, concurring and dissenting:

I concur in the result insofar as the majority holds that the police seizure at Gladstone was unreasonable. I do not agree, however, that a principled distinction exists under the fourth amendment between the police seizures at Independence and Gladstone. As to both storage facilities, the record establishes that

—the lessor left the apparent contraband in storage until the police arrived;

—the lessor closed the doors to the unlocked units and secured the outside gate;

—the police, not the lessor, actually removed the evidence.

The point of distinction made between the lessor's conduct at Independence (held to be a private seizure) and Gladstone (held not to be a private seizure) emphasizes the fact that the lessor mounted a guard over the premises at Independence and thus effectively barred the lessee from removing or destroying the contraband in the storage unit. I presume that a lessor of individual storage units may also effectively bar a lessee from access to such unit by bolting an exterior door, as at Gladstone. *Ante* at 10. A hotel proprietor who possesses the hotel guest's room key similarly possesses the power to bar the guest from his room. When the hotel owner turns the key over to the police to search the room, is that search and seizure lawful under fourth amendment strictures? *Stoner v. California*, 376 U.S. 483 (1964), suggests not.

Neither appellant nor the majority cites any case law in support of the distinction drawn in this case. The expectation of privacy which underpins an owner's right to be free of unreasonable governmental seizure of his pos-

sessions does not rest upon an owner's relative ability to retrieve his property. *See Stoner v. California, supra; United States v. Chadwick,* 433 U.S. 1 (1977); *Arkansas v. Sanders,* ..... U.S. ....., 99 S.Ct. 2586 (1979).

In *United States v. Chadwick, supra,* FBI agents had lawful possession of a footlocker with probable cause to believe it contained marijuana. The owners had been arrested and " 'there was no risk that whatever was contained in the footlocker trunk would be removed by the defendants or their associates.' " *Id.* at 4, *quoting* an FBI agent. The Supreme Court observed:

> With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant. [*Id.* at 13 (footnote omitted).]

A footnote to this holding makes it clear that the focus of the fourth amendment is the owner expectation of privacy, not his inability to retrieve the contents. The footnote reads in part:

> Respondent's principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private. [*Id.* at 13 n.8.]

The Supreme Court concluded in *Chadwick*:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a

> line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded. [*Id.* at 15-16 (footnote omitted).]

Here, by mounting a guard at the storage facility, the lessor at best unlawfully repossessed the locker unit.[1] As in *Chadwick,* the lessee retained privacy interests in the contents of his locker when the police took control or dominion over the storage unit. Like the search in *Chadwick,* it was an "additional and greater intrusion" for the police to seize the contents of the locker. *Id.* at 13. Accordingly, I conclude that the warrantless seizure at Independence was unreasonable under the fourth amendment.[2]

Thus, I would also affirm that part of the order of the district court suppressing the contraband removed from the Independence facility.

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1. Such unauthorized repossession is ineffective to empower the lessor to consent to a police seizure, absent evidence of abandonment by the lessee. *See Drummond v. United States,* 350 F.2d 983, 989 (8th Cir. 1965), *cert. denied,* 384 U.S. 944 (1966); *United States v. Wilson,* 472 F.2d 901 (9th Cir.), *cert. denied,* 414 U.S. 868 (1973); *Eisentrager v. Hocker,* 450 F.2d 480 (9th Cir. 1971).

2. The majority acknowledges that the plain view exception does not apply here. *Ante* at 5. Furthermore, it is clear that requiring a warrant on these facts would not impose an undue burden upon the police. *Cf. United States v. Bomengo,* 580 F.2d 173 (5th Cir. 1978), *cert. denied,* 99 S.Ct. 1022 (1979) (after viewing illegal gun silencers uncovered by a prior private search, the police obtained a warrant before seizing the items).

Chief Judge Lay and Judge McMillian join in this concurring and dissenting opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 79-00017-CR-W-2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES WILLIS ROBERTS,
Defendant.

ORDER GRANTING MOTION TO SUPPRESS PHYSICAL EVIDENCE

(Filed May 9, 1979)

The following facts were developed during an evidentiary hearing that was held by this Court on April 17, 1979. In November, 1978, defendant was the lessee of certain storage units at Stor-All of Independence and at Stor-All of Gladstone. The storage units at these locations were generally kept locked by the lessees with the lessees' own padlocks. On the evening of November 29, 1978, employees at the Stor-All of Independence and at the Stor-All of Gladstone notified Tom Pepper, who is the general manager of all of the Stor-All businesses in the Kansas City area, that they had discovered several unlocked storage units at these two locations. After hearing of the unlocked units, Mr. Pepper and a private investigator

who worked for Mr. Pepper went to the Gladstone Stor-All to investigate the unlocked units. In the course of their investigation, they discovered broken padlocks near several of the unlocked units. Mr. Pepper and the private investigator entered the unlocked units and found, in one of them, what appeared to be a large bag of marihuana. Mr. Pepper closed the door to that storage unit and, along with the private investigator, went to the Independence Stor-All.

At the Independence Stor-All, Mr. Pepper again discovered broken padlocks near several unlocked storage units. Mr. Pepper looked into these unlocked units and discovered, in one of them, several boxes of what appeared to be marihuana. Mr. Pepper called the Kansas City police department and told them what he had discovered. At approximately 9:00 p.m. on November 29, 1978, several law enforcement officers, including D.E.A. Task Force Officer Jack Albrecht, arrived at the Independence Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the boxes and he explained to the officers what he had seen. The officers then entered the storage unit and seized what was later identified to be approximately 900 pounds of marihuana.

The following morning, the officers met Mr. Pepper at the Gladstone Stor-All. Mr. Pepper took the officers to the storage unit where he had observed the large bag on the prior evening. The officers entered the storage unit and seized the bag, which was later found to contain approximately 56 pounds of marihuana.

The officers who seized the marihuana did not, on either the evening of November 29, 1978 or the morning of November 30, 1978, have warrants for the search of the storage bins or for the seizure of the marihuana.

After investigation, the officers identified defendant Roberts as the lessee of the storage bins in which the marihuana was found. Defendant Roberts was subsequently indicted for two counts of possession with intent to distribute marihuana, in violation of 21 U.S.C. § 841 (a)(1) (1976).

Defendant moves to suppress the marihuana seized from the storage bins for the reason that the seizures were made in violation of his Fourth Amendment rights. The United States' sole argument in opposition to defendant's motion is that both the search and the seizure of the storage bins were conducted by the general manager and the private investigator and that the warrant requirement of the Fourth Amendment was not, therefore, applicable.

This Court's analysis of the question presented by defendant's motion must begin with the recognition that warrantless searches or seizures are per se unreasonable unless there are special circumstances which excuse compliance with the Fourth Amendment requirement. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55 (1971). This Court also recognizes, however, that, "individual conduct devoid of governmental involvement is beyond the scope of the exclusionary rule." *United States v. Kelly,* 529 F.2d 1365, 1371 (8th Cir. 1976).

With these principles as a guide, it is clear that the initial discovery of the marihuana by the general manager and the private investigator is beyond the scope of the exclusionary rule since it is uncontradicted that their search of the storage bins was not prompted or aided by law enforcement officers. As in *United States v. Kelly, supra,* government involvement in this case is limited to the activity of the D.E.A. after first being called by the general manager. The only question presented, therefore,

is whether the seizure of the marihuana by the D.E.A. officers constituted governmental action.

The United States argues that the seizure of the marihuana was completed by the general manager and the private investigator when they secured the area surrounding the storage bins, and, thus, that the D.E.A. officers merely took the previously seized marihuana from the general manager and the private investigator. This argument has no merit, however, in light of the Eighth Circuit's holding in *United States v. Kelly, supra.* In that case, an employee of a common carrier discovered certain items that he believed to be contraband, in the course of a routine delivery. The employee took the items to his office and called the F.B.I. An F.B.I. agent then went to the employee's office, inspected the items taken by the employee, and then took the items from the employee. The trial court refused to suppress the items taken by the F.B.I. agent, but on appeal the Eighth Circuit reversed, holding that the agent's actions in taking the items from the employee was a governmental seizure. *United States v. Kelly, supra* at 1371.

Since the facts of this case are indistinguishable from those in *Kelly,* this Court is convinced that the Eighth Circuit's holding in that case requires the conclusion that the D.E.A.'s action in taking the marihuana from the storage bins was governmental action and is, therefore, covered by the Fourth Amendment warrant requirement.

It is clear that the D.E.A. had ample opportunity to obtain a search warrant based on an affidavit of either the general manager or the private investigator. The United States has, however, offered no explanation for its failure to do so. In fact, the reason for the United States' sole reliance on the argument that there was no governmental action in this seizure is apparent, since, on

the basis of the uncontradicted facts, it is clear that none of the exceptions to the warrant requirement were present. The search and subsequent seizure were not made incident to a lawful arrest. *Chimel v. California,* 395 U.S. 752 (1969). Also, it is uncontradicted that the premises of the storage bins were well secured, and thus there can be no argument that exigent circumstances justified the seizure. *Johnson v. United States,* 333 U.S. 10 (1943). In addition, there can be no argument that the plain view exception applied. In *Chapman v. United States,* 365 U.S. 610 (1961), the Court rejected the argument that law enforcement officers may gain entry to a building at a landlord's invitation and then seize anything within plain view. The Court held, "to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords].'" *Chapman v. United States, supra* at 616-17.

Since this Court holds that the government's action in seizing the marihuana was subject to the warrant requirement of the Fourth Amendment, and since it is clear that the government did not obtain a search warrant or establish (or even argue) any exception to the warrant requirement, it is

ORDERED that defendant's motion to suppress physical evidence be, and hereby is, granted.

/s/ Wm. R. Collinson
District Judge

Dated: May 9, 1979.